

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 10, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TONI MICHELE E.,¹

Plaintiff,

v.

KILOLO KIJAKAZI,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 1:22-CV-03026-LRS

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment.
ECF Nos. 10, 11. This matter was submitted for consideration without oral
argument. Plaintiff is represented by attorney D. James Tree. Defendant is

¹ The court identifies a plaintiff in a social security case only by the first name and
last initial in order to protect privacy. See LCivR 5.2(c).

1 represented by Special Assistant United States Attorney Lars J. Nelson. The Court,
2 having reviewed the administrative record and the parties' briefing, is fully
3 informed. For the reasons discussed below, Plaintiff's Motion, ECF No. 10, is
4 granted and Defendant's Motion, ECF No. 11, is denied.

5 **JURISDICTION**

6 Plaintiff Toni Michele E. (Plaintiff), filed for supplemental security income
7 (SSI) on January 6, 2016, and alleged an onset date of March 3, 2015. Tr. 185-90.
8 Benefits were denied initially, Tr. 105-08, and upon reconsideration, Tr. 114-24.
9 Plaintiff appeared at a hearing before an administrative law judge (ALJ) on
10 September 14, 2017. Tr. 37-81. On June 4, 2018, the ALJ issued an unfavorable
11 decision, Tr. 12-31, and on January 7, 2020, the Appeals Council denied review. Tr.
12 1-6. Plaintiff appealed to the United States District Court for the Eastern District of
13 Washington, and on June 25, 2020, the Honorable Fred Van Sickle issued an order
14 remanding the matter for further proceedings. Tr. 1202-18.

15 On December 15, 2021, Plaintiff appeared at a second hearing, Tr. 1123-64,
16 and on December 27, 2021, the ALJ issued another unfavorable decision. Tr. 1087-
17 1108. The matter is now before this Court pursuant to 42 U.S.C. § 1383(c)(3).

18 **BACKGROUND**

19 The facts of the case are set forth in the administrative hearing and transcripts,
20 the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and are
21 therefore only summarized here.

1 Plaintiff was 44 years old at the time of the first hearing. Tr. 64. She went to
2 school through the eleventh grade. Tr. 65. She has work experience in marketing
3 and vending and as a dietary aide. Tr. 65-67. At the first hearing, Plaintiff testified
4 she works two days a week and does light housework the rest of the week. Tr. 47.
5 She testified that she is unable to work full-time because she has severe pain if she is
6 on her feet too long. Tr. 53. Her hands go numb if she uses them too much. Tr. 53.
7 She has debilitating headaches and cannot get out of bed some days due to headache
8 pain. Tr. 53. She had neck surgery in 2015 and 2016 which stabilized her neck but
9 she still has a lot of pain. Tr. 56. At the second hearing, Plaintiff testified that in
10 addition to her physical problems, she testified that she has depression, anger issues,
11 and PTSD. Tr. 1144.

12 STANDARD OF REVIEW

13 A district court's review of a final decision of the Commissioner of Social
14 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
15 limited; the Commissioner's decision will be disturbed "only if it is not supported by
16 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158
17 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable
18 mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and
19 citation omitted). Stated differently, substantial evidence equates to "more than a
20 mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted).
21 In determining whether the standard has been satisfied, a reviewing court must

1 consider the entire record as a whole rather than searching for supporting evidence in
2 isolation. *Id.*

3 In reviewing a denial of benefits, a district court may not substitute its
4 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156
5 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
6 rational interpretation, [the court] must uphold the ALJ’s findings if they are
7 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
8 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an ALJ’s
9 decision on account of an error that is harmless.” *Id.* An error is harmless “where it
10 is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
11 (quotation and citation omitted). The party appealing the ALJ’s decision generally
12 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
13 396, 409-10 (2009).

14 **FIVE-STEP EVALUATION PROCESS**

15 A claimant must satisfy two conditions to be considered “disabled” within the
16 meaning of the Social Security Act. First, the claimant must be “unable to engage in
17 any substantial gainful activity by reason of any medically determinable physical or
18 mental impairment which can be expected to result in death or which has lasted or
19 can be expected to last for a continuous period of not less than twelve months.” 42
20 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be “of such
21 severity that he is not only unable to do his previous work[,] but cannot, considering

1 his age, education, and work experience, engage in any other kind of substantial
2 gainful work which exists in the national economy.” 42 U.S.C. § 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to determine
4 whether a claimant satisfies the above criteria. *See* 20 C.F.R. § 416.920(a)(4)(i)-(v).

5 At step one, the Commissioner considers the claimant’s work activity. 20 C.F.R. §
6 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
7 Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(b).

8 If the claimant is not engaged in substantial gainful activity, the analysis
9 proceeds to step two. At this step, the Commissioner considers the severity of the
10 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
11 “any impairment or combination of impairments which significantly limits [his or
12 her] physical or mental ability to do basic work activities,” the analysis proceeds to
13 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
14 this severity threshold, however, the Commissioner must find that the claimant is not
15 disabled. 20 C.F.R. § 416.920(c).

16 At step three, the Commissioner compares the claimant’s impairment to
17 severe impairments recognized by the Commissioner to be so severe as to preclude a
18 person from engaging in substantial gainful activity. 20 C.F.R. § 416.920(a)(4)(iii).
19 If the impairment is as severe or more severe than one of the enumerated
20 impairments, the Commissioner must find the claimant disabled and award benefits.
21 20 C.F.R. § 416.920(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess the
3 claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
6 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

7 At step four, the Commissioner considers whether, in view of the claimant's
8 RFC, the claimant is capable of performing work that he or she has performed in the
9 past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable
10 of performing past relevant work, the Commissioner must find that the claimant is
11 not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing
12 such work, the analysis proceeds to step five.

13 At step five, the Commissioner should conclude whether, in view of the
14 claimant's RFC, the claimant is capable of performing other work in the national
15 economy. 20 C.F.R. § 416.920(a)(4)(v). In making this determination, the
16 Commissioner must also consider vocational factors such as the claimant's age,
17 education and past work experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant
18 is capable of adjusting to other work, the Commissioner must find that the claimant
19 is not disabled. 20 C.F.R. § 416.920(g)(1). If the claimant is not capable of
20 adjusting to other work, analysis concludes with a finding that the claimant is
21 disabled and is therefore entitled to benefits. 20 C.F.R. § 416.920(g)(1).

1 The claimant bears the burden of proof at steps one through four above.
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
3 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
4 capable of performing other work; and (2) such work “exists in significant numbers
5 in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d
6 386, 389 (9th Cir. 2012).

7 **ALJ’S FINDINGS**

8 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
9 activity since January 6, 2016, the application date. Tr. 1092. At step two, the ALJ
10 found that Plaintiff has the following severe impairments: degenerative disc disease,
11 migraine headaches, and obesity. Tr. 1092. At step three, the ALJ found that
12 Plaintiff does not have an impairment or combination of impairments that meets or
13 medically equals the severity of a listed impairment. Tr. 1094.

14 The ALJ then found that Plaintiff has the residual functional capacity to
15 perform light work with the following additional limitations:

16 The claimant can occasionally lift and carry 20 pounds and frequently
17 carry ten pounds. She can stand or walk for six hours in an eight-hour
18 workday and sit for six hours in an eight-hour workday, with the usual
19 breaks. The claimant can occasionally climb ramps and stairs and
20 never climb ladders, ropes, or scaffolds. She can occasionally stoop,
kneel, crouch, and crawl. The claimant must avoid concentrated
exposure to fumes, odors, dusts, gases, and poor ventilation and [must
be] primarily in non-smoking environments and must avoid even
moderate exposure to vibrations and hazards.

21 Tr. 1095.

1 At step four, the ALJ found that Plaintiff has no past relevant work. Tr. 1099.
2 At step five, after considering the testimony of a vocational expert and Plaintiff's
3 age, education, work experience, and residual functional capacity, the ALJ found
4 that there are jobs that exist in significant numbers in the national economy that
5 Plaintiff can perform such as mail clerk, ticket taker, or office helper. Tr. 1100.

6 Thus, the ALJ found that Plaintiff has not been under a disability as defined in
7 the Social Security Act since January 6, 2016, the date the application was filed. Tr.
8 1100.

9 ISSUES

10 Plaintiff seeks judicial review of the Commissioner's final decision denying
11 supplemental security income under Title XVI of the Social Security Act. ECF No.
12 10. Plaintiff raises the following issues for review:

- 13 1. Whether the ALJ properly declined to reopen her prior application;
- 14 2. Whether the ALJ properly considered the medical opinion evidence;
- 15 3. Whether the ALJ properly considered Plaintiff's mental impairments at
16 step two; and
- 17 4. Whether the ALJ properly evaluated Plaintiff's symptom testimony.

18 ECF No. 10 at 2.

DISCUSSION

A. Prior Claim

Plaintiff contends the ALJ erred by failing to reopen her prior claim. ECF No. 10 at 20. Plaintiff filed a previous Title XVI application for SSI on April 2, 2015, which was denied on August 20, 2015. Tr. 15. The ALJ noted that counsel requested that the prior application be reopened, but the ALJ “does not find a basis for reopening the claimant’s prior Title XVI application (20 CFR 416.1488).” Tr. 1090. The regulations provide that a decision “may be reopened” within 12 months of the date of the initial determination “for any reason.” 20 C.F.R. § 416.1488. Plaintiff observes that her current application date of January 6, 2016, was within 12 months of the prior determination. ECF No. 10 at 21. Plaintiff argues that certain relevant evidence is excluded from the current claim if the prior claim is not reopened. ECF No. 10 at 21.

The ALJ’s discretionary denial of Plaintiff’s request to re-open her prior claim is beyond this Court’s review. *See Taylor v. Heckler*, 756 F.2d 872, 877 (9th Cir. 1985); *Krumpelman v. Heckler*, 767 F.2d 586, 588 (9th Cir. 1985); *see also* 20 C.F.R. § 416.1403(a)(5) (denial of request to re-open not subject to judicial review). The general rule is that the Secretary’s decision not to reopen a claim for benefits is not a “final decision” within the meaning of § 405(g), and therefore courts lack jurisdiction to review a decision not to reopen. *Califano v. Sanders*, 430 U.S. 99, 109 (1977). There is a limited exception to the general rule when the claimant has

1 challenged the decision not to reopen on constitutional grounds, *id.*, which is not at
2 issue here. The Court does not have jurisdiction to review the ALJ's decision not to
3 reopen Plaintiff's prior claim.

4 **B. Medical Opinions**

5 Plaintiff contends the ALJ failed to properly consider the opinions of David
6 W. Shoemaker, M.D., David Morgan, Ph.D., and Dyke Dickie, PT. ECF No. 10 at
7 7-13. There are three types of physicians: "(1) those who treat the claimant
8 (treating physicians); (2) those who examine but do not treat the claimant
9 (examining physicians); and (3) those who neither examine nor treat the claimant but
10 who review the claimant's file (nonexamining or reviewing physicians)." *Holohan*
11 *v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (brackets omitted).
12 "Generally, a treating physician's opinion carries more weight than an examining
13 physician's, and an examining physician's opinion carries more weight than a
14 reviewing physician's." *Id.* "In addition, the regulations give more weight to
15 opinions that are explained than to those that are not, and to the opinions of
16 specialists concerning matters relating to their specialty over that of nonspecialists."
17 *Id.* (citations omitted).²

19 ² For claims filed on or after March 27, 2017, the regulations changed the framework
20 for evaluation of medical opinion evidence. *Revisions to Rules Regarding the*
21 *Evaluation of Medical Evidence*, 2017 WL 168819, 82 Fed. Reg. 5844-01 (Jan. 18,

1 If a treating or examining physician's opinion is uncontradicted, an ALJ may
2 reject it only by offering "clear and convincing reasons that are supported by
3 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
4 "However, the ALJ need not accept the opinion of any physician, including a
5 treating physician, if that opinion is brief, conclusory and inadequately supported by
6 clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
7 (internal quotation marks and brackets omitted). "If a treating or examining doctor's
8 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by
9 providing specific and legitimate reasons that are supported by substantial
10 evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81 F.3d 821, 830-31
11 (9th Cir 1995)).

12 *1. David W. Shoemaker, M.D.*

13 In August 2018, Plaintiff presented to Dr. Shoemaker, a treating physician, for
14 low back pain which exacerbated after she tripped and fell. Tr. 1456. On exam,
15 Plaintiff's straight leg raise was limited by pain, she had decreased pinprick, and she
16 complained of numbness and tingling. Tr. 1457. Dr. Shoemaker repeated an
17 epidural steroid injection and prescribed medication and physical therapy. Tr. 1457.
18 He also assessed the following restriction: "[w]eight lifting, pushing and overhead
19 _____
20 2017); 20 C.F.R. § 416.920c. Plaintiff's claim was filed in January 2016, so the
21 previous method of evaluating medical opinions applies.

1 restrictions nothing more than 10 pounds.” Tr. 1457. Dr. Shoemaker assessed the
2 same or similar restrictions in November 2018, September 2019, and August 2020,
3 and in November 2019 indicated that Plaintiff’s lifting restriction was “nothing more
4 than a gallon of milk.” Tr. 1429.

5 The ALJ did not address the lifting, pushing, and overhead restrictions
6 assessed by Dr. Shoemaker. Tr. 1096-99. The ALJ need not discuss all evidence
7 presented but the ALJ must explain why significant probative evidence has been
8 rejected. *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984). For claims
9 filed before March 27, 2017, like this one, medical opinions are statements from
10 acceptable medical sources that reflect judgments about the nature and severity of
11 the claimant’s impairments, including the claimant’s symptoms, diagnosis and
12 prognosis, what the claimant can do despite any impairment, and the claimant’s
13 physical or mental restrictions. 20 C.F.R. § 416.927(a)(1). Dr. Shoemaker’s
14 statements regarding lifting, pushing, and overhead limitations are opinions about
15 Plaintiff’s physical limitations and are thus relevant evidence which should be
16 discussed by the ALJ. The ALJ’s oversight of these opinion statements constitutes
17 error.

18 Defendant argues that the ALJ’s rejection of “disability ratings” based on the
19 results of the Oswestry Disability index amounts to a rejection of Dr. Shoemaker’s
20 opinions. ECF No. 11 at 13. The Court is not persuaded. First, the ALJ did not cite
21 to or reference any of the pages with Dr. Shoemaker’s assessment of limitations in

1 his discussion of the rejected disability ratings. Tr. 1099. The ALJ cited Dr.
2 Shoemaker's December 2015 and September 2020 office visit notes which indicated
3 that Plaintiff had scores of 26 and 40, respectively, on Oswestry questionnaires.
4 ECF No. 1099 (citing Ex. 3F p. 45/Tr. 384, 18F p. 8/Tr. 1412). However, Dr.
5 Shoemaker did not assess any lifting, pushing, or overhead restriction on those dates.
6 Tr. 386, 1413. The ALJ also cited the functional assessment of Dyke Dickie, PT,
7 which was signed by Dr. Shoemaker to certify that physical therapy services were
8 authorized, but also indicated findings of limitations in gait, mobility, and flexibility,
9 and that Plaintiff was limited in any lifting, kneeling, squatting, bending, and
10 twisting. Tr. 1099 (citing Ex. 22F p. 70/Tr. 1579). None of this evidence supports
11 the conclusion that the ALJ explicitly or implicitly rejected Dr. Shoemaker's
12 statements regarding Plaintiff's limitations.

13 Second, while it is true that Dr. Shoemaker on occasion considered Plaintiff's
14 self-report in the form of the results of the Oswestry questionnaire, it is not clear that
15 Dr. Shoemaker relied only on the results of Oswestry questionnaire in making his
16 assessments. *See* Tr. 1432-33, 1453-54, 1456-57 (each referencing Oswestry
17 results); *see also* Tr. 1416-18, 1429 (neither mentioning Oswestry results). For
18 example, as noted *supra*, in August 2018 Dr. Shoemaker's opinion also weighed
19 exam findings and other information contained in the office visit notes. Tr. 1432-33.
20 Similarly, Mr. Dickie's assessment, which was signed by Dr. Shoemaker, includes
21 objective findings and a functional assessment. Tr. 1578-79. The ALJ's failure to

1 address Dr. Shoemaker's various assessments was an error. The matter must be
2 remanded for the ALJ to consider Dr. Shoemaker's opinions regarding Plaintiff's
3 lifting, pushing, and overhead limitations.

4 *2. Dyke Dickie, PT*

5 For claims before March 27, 2017, the opinion of an acceptable medical
6 source, such as a physician or psychologist, is given more weight than an opinion
7 from a source who is not an acceptable medical source or who is a non-medical
8 source. 20 C.F.R. § 416.927; *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996);
9 *see* 20 C.F.R. § 416.902 (acceptable medical sources include licensed physicians,
10 licensed or certified psychologists, licensed optometrists, licensed podiatrists,
11 qualified speech-language pathologists, licensed audiologists, licensed advanced
12 practice registered nurses, and licensed physician assistants). However, an ALJ is
13 required to consider evidence from non-acceptable medical sources, such as physical
14 therapists. 20 C.F.R. § 416.927(f). The ALJ must consider evidence from non-
15 acceptable medical sources but may discount testimony from these sources if the
16 ALJ "gives reasons germane to each witness for doing so." *Molina*, 674 F.3d at
17 1104.

18 Mr. Dickie's physical therapy treatment notes from 2016-17 and January 2021
19 contain various assessments of functional limitations such as limited in daily
20 activities, overhead motions, behind the back motions, washing, and sometimes
21 dressing; limited in upper extremity activities and needs to maintain light weight and

1 low stress activity; limited gait due to pain; limited in stairs due to recent falls;
2 limited in overhead type motions, any heavy lifting or overuse activities; and limited
3 gait, mobility, flexion, kneeling, squatting, bending, or twisting. Tr. 1530, 1541,
4 1560, 1570, 1578.

5 The only record from Mr. Dickie addressed by the ALJ is a September 2017
6 initial evaluation and plan of care indicating the Plaintiff is “limited in overhead type
7 motions, any heavy lifting or overuse activities.” Tr. 1098 (citing Tr. 1541³). The
8 ALJ rejected the September 2019 assessment as vague, lacking permanence, and “in
9 the context of physical therapy that was intended to improve the claimant’s
10 functioning.” Tr. 1098. The ALJ’s oversight of the other limitations assessed by
11 Mr. Dickie at different points in the record was erroneous and reflects a lack of
12 consideration of the overall context regarding the physical therapy treatment record.
13 As a result, Mr. Dickie’s assessments of limitations should also be reconsidered on
14 remand.

15 *3. David Morgan, Ph.D.*

16 In November 2020, Dr. Morgan completed a DSHS Psychological/Psychiatric
17 Evaluation form and diagnosed depression and PTSD. Tr. 1459-63. He opined that
18

19 ³ Mr. Dickie’s physical therapy note was co-signed by Beth McManis, ARNP, who
20 certified that the rehabilitative services were required and authorized. It does not
21 appear that her signature represents the independent opinion of Ms. McManis.

1 Plaintiff has marked limitations in five functional areas: the ability to perform
2 activities within a schedule, maintain attendance, and be punctual; the ability to
3 adapt to changes in the work setting; the ability to communicate and perform
4 effectively in a work setting; the ability to maintain appropriate behavior in a work
5 setting; and the ability to complete a normal workday and work week without
6 interruptions from psychological symptoms. Tr. 1461.

7 The ALJ gave little weight to Dr. Morgan's opinion. Tr. 1098. If a treating or
8 examining physician's opinion is uncontradicted, an ALJ may reject it only by
9 offering "clear and convincing reasons that are supported by substantial evidence."
10 *Bayliss*, 427 F.3d at 1216. Dr. Morgan's opinion is the only psychological opinion
11 in the record and is thus uncontradicted. The ALJ's reasons for rejecting the opinion
12 must therefore be clear and convincing.

13 First, the ALJ found that Dr. Morgan's opinion is not supported by Dr.
14 Morgan's findings and Dr. Morgan did not explain the basis for the limitations
15 assessed. Tr. 1098. A medical opinion may be rejected by the ALJ if it is
16 conclusory, contains inconsistencies, or is inadequately supported. *Bray*, 554 F.3d at
17 1228; *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002). Dr. Morgan
18 completed the "Clinical Findings" section of the form and indicated that Plaintiff's
19 depression was of moderate severity and her PTSD was of moderate to marked
20 severity on a daily basis based on various symptoms. Tr. 1461. The ALJ did not
21 comment on this portion of the opinion which explains at least minimally the basis

1 for Dr. Morgan’s findings. The ALJ dismissed some abnormal mental status exam
2 findings as unsupportive of Dr. Morgan’s opinion, but it is not clear what basis there
3 is for doing so. It is improper for an ALJ to act as his own medical expert,
4 substituting his opinion for the opinion of a medical doctor. *Day v. Weinberger*, 522
5 F.2d 1154, 1156 (9th Cir. 1975); *see also Nguyen v. Chater*, 172 F.3d 31, 35 (1st
6 Cir. 1999) (As a lay person, an ALJ is “not at liberty to ignore medical evidence or
7 substitute his own views for uncontroverted medical opinion”; he is “simply not
8 qualified to interpret raw medical data in functional terms.”); *Balsamo v. Chater*,
9 142 F.3d 75, 81 (2d Cir.1998) (“[T]he ALJ cannot arbitrarily substitute his own
10 judgment for competent medical opinion.” (citations omitted)). This is not a clear
11 and convincing reason supported by substantial evidence.

12 Second, the ALJ found the limitations assessed by Dr. Morgan are
13 inconsistent with the record as a whole. Tr. 1098. An ALJ may discredit medical
14 opinions that are unsupported by the record as a whole or by objective medical
15 findings. *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir.
16 2004). The ALJ concluded that Plaintiff’s “scant treatment history for mental
17 health” contradicts these findings. However, “the fact that claimant may be one of
18 millions of people who did not seek treatment for a mental disorder until late in the
19 day is not a substantial basis on which to conclude that [a psychologist’s]
20 assessment of claimant’s condition is inaccurate.” *Nguyen v. Chater*, 100 F.3d
21 1462, 1465 (9th Cir. 1996). Further, the ALJ found Plaintiff “consistently presents

1 with normal mood and affect, intact memory, and cooperative and pleasant
2 behavior,” but it is unclear how five records from four office visits reflecting
3 normal presentation over the course of six years of medical records demonstrates a
4 consistent presentation. Tr. 1098 (citing Tr. 415, 1449, 1508, 1710, 1713-14).
5 Plaintiff cites two pages of abnormal mental status findings and treatment for
6 psychological symptoms which were not addressed by the ALJ. ECF No. 10 at 5-
7 6. The ALJ’s findings do not constitute a clear and convincing reason supported
8 by substantial evidence.

9 The ALJ had a heightened duty to provide clear and convincing reasons
10 supported by substantial evidence to justify giving no weight to Dr. Morgan’s
11 uncontradicted medical opinion. The ALJ’s discussion of the evidence and the
12 reasons given for rejecting Dr. Morgan’s opinion do not constitute clear and
13 convincing reasons supported by substantial evidence. On remand, the ALJ should
14 reconsider Dr. Morgan’s opinion and the psychological record and ensure that
15 substantial evidence supports the weight assigned to the opinion. It may be helpful
16 to obtain a consultative or expert opinion regarding Plaintiff’s mental health
17 conditions.

18 **C. Step Two – Mental Impairments**

19 Plaintiff argues the ALJ erred by not finding her mental disorders to be severe
20 impairments at step two. ECF No. 10 at 4. The step two finding is based on the
21 same evaluation of the evidence the ALJ used to improperly reject Dr. Morgan’s

1 opinion. Tr. 1093, 1098. Because Dr. Morgan’s opinion and the psychological
2 evidence must be considered, and because the ALJ may further develop the record
3 by obtaining a consultative or expert psychological opinion, the step two finding
4 must also be reconsidered on remand.

5 **D. Symptom Testimony**

6 Plaintiff challenges the ALJ's consideration of Plaintiff's symptom claims.
7 ECF No. 10 at 13-21. The ALJ found Plaintiff’s “statements concerning the
8 intensity, persistence, and limiting effects of these symptoms are not entirely
9 consistent with the medical evidence and other evidence in the record for the reasons
10 explained in this decision.” Tr. 1096. The evaluation of a claimant’s symptom
11 statements relies, in part, on the assessment of the medical evidence. *See* 20 C.F.R.
12 § 416.929(c); S.S.R. 16-3p. Because the case is remanded for the ALJ to readdress
13 the medical opinions discussed *supra*, a new assessment of Plaintiff’s subjective
14 symptom statements will be necessary.

15 **CONCLUSION**

16 Having reviewed the record and the ALJ’s findings, this Court concludes the
17 ALJ’s decision is not supported by substantial evidence and free of harmful legal error.
18 Plaintiff requests remand for reconsideration of the evidence. On remand, the ALJ is
19 instructed to conduct a new sequential analysis after reconsidering the medical and
20
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1 psychological opinion evidence. The ALJ may develop the psychological record
2 by obtaining a consultative or expert psychological opinion.

3 Accordingly,

4 1. Plaintiff's Motion for Summary Judgment, ECF No. 10, is GRANTED.

5 2. Defendant's Motion for Summary Judgment, ECF No. 11, is DENIED.

6 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this Order
7 and provide copies to counsel. Judgment shall be entered for Plaintiff and the file
8 shall be **CLOSED**.

9 **DATED** October 10, 2023.

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11 LONNY R. SUKO
12 Senior United States District Judge
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